IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 406

FEDERAL TRADE COMMISSION, *Petitioner*

v.

SIMPLICITY PATTERN CO., INC.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR SIMPLICITY PATTERN COMPANY, INC.

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By reference, the Statement and Argument contained in Simplicity's brief in No. 447 are included herein. As noted there, both of these petitions present integral parts of the same basic question, and our argument on Simplicity's petition relates, as well, to the issues here.

The brief of the Federal Trade Commission misstates the holding of the Court of Appeals, offers an incomplete version of the legislative history, reads into one subsection the limitations of another while arguing the inappropriateness of such a construction, fails to give proper scope to subsection 2(b)'s "justification", and once more relies upon the subsection 2(c) cases which the Court of Appeals held "have no bearing whatsoever on our problem."

The Commission Misstates the Court of Appeals Holding

The Commission's brief contends that the Court of Appeals improvised a "cost justification defense [applicable to subsection 2(e)] much broader in scope than the limited defense expressly provided for in § 2(a)." The Court did not; if anything its "cost justification" is narrower in scope than the cost proviso of subsection 2(a). The latter permits "price differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery, resulting from the differing methods or quantities in which commodities to such purchasers were sold or delivered." The Court held Simplicity entitled to undertake justification "in terms of its cost of sale and delivery as relating to the different methods of sale and distribution by the two groups . . ." (R. 338)*

The Commission's Legislative History Is Incomplete

The legislative history with respect to cost justification is in no sense as crisp or simple as the Commission would make out. The meager quotations from the two Committee reports, which the Commission states "explained the meaning of the proviso entirely in terms of price differentials and nowhere suggested that it had any broader scope," (p. 14) are readily countered by statements from precisely the same sources, suggesting a *much* broader scope:

> "The object of the bill . . . is to suppress more effectually discriminations between customers of

* The Commission's further contention that "cost justification" under 2(e) might be "promotive of monopoly" because not conditioned by the "quantity-limits" proviso of 2(a) is almost frivolous. No valid Commission order has *ever* been entered under that proviso. See *FTC* v. *B. F. Goodrich Co., et al.*, 242 F. 2d 31 (D.C. Cir. 1957). And to the extent that such a limitation might be significant in a 2(e) proceeding, we assume it *would* be applicable.

the same seller not supported by sound economic differences in their business positions or in the cost of serving them. Such discriminations are sometimes effected directly by price . . . and sometimes by separate allowances to favored customers for purported services." H. Rep. 2287, 74th Cong. 2d Sess., p. 7. See also Sen. Rep. 1502, 74th Cong. 2d Sess., p. 3.

"[The cost proviso] leaves trade and industry free from any restriction or impediment to the adoption and use of more economic processes of manufacture, methods of sale, and modes of delivery . . ." Id., p. 9. See also Sen. Rep. 1502, p. 5.

"Any physical economies that are to be found in mass buying and distribution . . . none of them are in the remotest degree disturbed by this bill. Nor does it in any way infringe the seller's freedom to give all or any part of the saving so effected to others with whom he deals . . ." Id., p. 17.

And this broad-gauge legislative motivation has been acknowledge by this Court *Automobile Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 73 (1953).

The Commission Itself Reads Limitations from One Subsection of the Act Into Another

The Commission's brief asserts the "structural independence of the several subsections of § 2" (p. 13) (although it concedes that they are "obviously closely related in basic purpose" (p. 12)) and urges that the limitations of one subsection are not to be read into another. Yet, the brief offers a graphic demonstration of the *impossibility* of completely insulating the various subsections of the act, by reading into subsection 2(d) the meeting competition defense of

subsection 2(b), which, on its face, is applicable *only* to subsections 2(a) and 2(e). While we do not challenge the correctness of the interpolation of 2(d) into 2(b), nor the enlightened policy considerations dictating an equation of 2(e) and 2(d), we point out that the proviso of 2(b) refers only to discriminations in "price" (2(a)) or in "the furnishing of services or facilities *to* any purchaser," (2(e)) but nowhere has reference to discriminations in "the payment of anything of value" to a purchaser for services or facilities furnished *by* him (2(d)). Clearly, as the Court of Appeals stated in *Elizabeth Arden* v. *Gus Blass,* these various subsections are "coordinate enumerations" to be construed in conformity with the "dominating general purpose" of the Act. 150 F. 2d 988, 992.*

The Commission's Brief Fails to Give Proper Scope to Subsection 2(b)'s "Justification"

In an effort to counter Simplicity's primary contention that subsection 2(b)'s "justification" must be endowed with substantive content—including not only the right to "cost justify" but also the even more fundamental right to rebut a prima facie case under 2(e) by showing absence of competitive injury—the Commission asserts that the section is only "pro-

* In our brief in No. 447 we pointed out that the Courts have always read into 2(e) the "commerce" and "competition" requirements of 2(a). (Brief, p. 37). Another Court of Appeals has recently read into 2(e) the "selection-of-customers" proviso of 2(a), *Naifeh* v. *Ronson Art Metal Works*, 218 F. 2d 202 (10th Cir. 1954); and the Commission for many years has read the "like grade and quality" test of 2(a) into 2(e)'s companion, 2(d). *In the Matter of Golf Ball Mfrs. Assoc.*, 26 FTC 824, 851 (1938). See also *Atlanta Trading Corp.* v. *Federal Trade Commission*, 258 F. 2d 365 (2d Cir. 1958).

cedural" and does not "create substantive defenses", citing to a single sparse and inconclusive sentence of legislative history.* What we have urged from the outset is that "justification" *must* have substantive meaning and that it cannot be limited solely to the meeting competition defense unless the avowed legislative purposes of the Act are to be disregarded.

In the Robinson-Patman Act, "Congress was dealing with competition which it sought to protect." *Standard Oil Co.* v. *Federal Trade Commission,* 340 U.S. 231, 249 (1951). But if evidence of cost justification is to be barred under a constricted reading of subsection 2(b) or, more fundamentally, if a seller cannot show absence of competitive injury under 2(b), then the Robinson-Patman Act is used as an instrument to disable competition.

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* The Commission's brief argues that 2(b) as first reported in the House referred only to discrimination "in price" that it was amended on the floor of the House, apparently as an afterthought, to include discrimination in "services or facilities furnished," as well, and that it was "only when the meeting competition defense . . . was extended to discriminations in services and facilities that it became necessary to expand the burden of proof provision [in the first paragraph]." (Brief, pp. 18-20) But the Commission's reading of the legislative history is incomplete. At the time of the House debate referred to, the companion Robinson bill had already been passed in the Senate and *there* the equivalent provision at all times had referred to discriminations in services and facilities furnished as well as in price. 80 Cong. Rec. 6435. Presumably the amendments on the floor of the House were to conform the House bill to the Senate bill. Moreover, the tail-end technical structure of the proviso in no way suggests that Congress intended it to wag the first paragraph, which firmly establishes the availability of "justification" to rebut a prima facie case, then adds, "*provided, however*" that nothing therein will limit the availability of the meeting competition defense.

The meeting competition defense—which the Commission here concedes is available to a charge under 2(e)—is, in effect, matter in avoidance. It presumes competitive injury resulting from the seller's differential practices but defines conditions under which the seller may avoid legal liability. "Congress meant to permit the natural consequences to follow the seller's action [in meeting competition in good faith]." *Standard Oil Co.* v. *Federal Trade Commission* at 250. But it is inconceivable that Congress would *permit* "justification" in legal avoidance of the injurious consequences of discriminatory practices but would not permit "justification" showing, in the first instance, that there were *no* injurious consequences.

This Court has held that so far as antitrust prohibitions are concerned, "the critical fact is the impact of the particular practice upon competition, not the label it carries." *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 397 (1953). If subsection 2(b)'s "justification" cannot be interpreted realistically to include rebuttal evidence showing an absence of competitive injury, or evidence of cost justification, then the furnishing of differential services and facilities is placed under greater legal hazard than competitively equivalent price differentials, and "forms or nomenclature" rather than competitive "impact", become crucial.* Any such unreasoning result would clash with the most basic antitrust objectives.

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* See Rowe, "How to Comply with Sections 2(e)-(f)" 1957 CCH Antitrust Law Symposium, 124, 131-136. See also Report of the Atty. Gen.'s Natl. Comm. to Study the Antitrust Laws, 191-2 (1955).

The Commission Again Relies Upon Inapplicable Subsection 2(c) Cases.

Once again the Commission relies for legal support upon a series of Court decisions in subsection 2(c) cases. The Court of Appeals below held that those rulings "have no bearing whatsoever on our problem". Since we addressed ourselves fully to their inapplicability in our brief in No. 447, we do not belabor the point here.

CONCLUSION

The decision of the Court of Appeals so far as it holds a "cost justification" defense available to a charge under 2(e) must be sustained. Upon the grounds set forth in Simplicity's petition herein, No. 447, the order of the Federal Trade Commission must now be set aside and the proceedings dismissed.

Respectfully submitted,

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